

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-154 32 4002 and LICENSE NO. 29101
Issued to: Michael Hugh QUINN

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2217

Michael Hugh QUINN

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 17 December 1979, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license for 6 months on 12 month's probation, upon finding him guilty of misconduct and negligence. The specification of negligence found proved alleges that while serving as operator on board the M/V PANTHER under authority of the license above captioned, on or about 25 April 1979, Appellant did, while said vessel was navigating on the Intercoastal Waterway at Hillsboro Inlet, Florida, fail to safely navigate said vessel in such a manner as to preclude the barges she was pushing from colliding with the Helen S. Marina, the F/V HELEN S, and various other vessels moored at the Helen S. Marina. The specification of misconduct found proved alleges that while serving as operator of the M/V PANTHER, Appellant did, on or about 24 April 1979 wrongfully operate the M/V PANTHER as master of said vessel without having endorsed the vessel's Certificate of Registry as required by 46 U.S.C. 40.

The hearing was held at Miami, Florida, on 10 and 11 July 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charges and each specification.

The Investigating Officer introduced in evidence the following documents: (a) NOAA Chart 11467, (b) certified copy of the Certificate of Registry for M/V PANTHER, (c) Reports of Vessel Casualty (8 copies), CG Form 2692, (d) photograph of the Hillsboro Inlet bridge, and (d) a drawing made by witness Phillips. The Investigating Officer also introduced the testimony of the bridge tender, the dock master of the Helen S. Marina, and the Engineer aboard PANTHER.

In defense, Appellant offered in evidence his own testimony

and the following documentary evidence: (a) a report of the South Florida Water Management District, (b) photographs of the sunken PANTHER, (3) explanation by the South Florida Water Management Division as to how the canals enter the ICW, and (d) a statement of Mr. Robert Gawne relating to the flow of water from C-14 canal.

After the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant suspending Appellant's license No. 29101 for a period of six (6) months on twelve (12) months' probation.

The entire decision was served on 27 December 1979. Appeal was timely filed on 30 January 1980 and perfected on 3 March 1980.

FINDINGS OF FACT

On 25 April 1979, Appellant was serving as operator on board M/V PANTHER and acting under authority of his license while the vessel was underway in the Intercoastal Waterway.

At about 1300 on 24 April 1979, PANTHER, with the tug LITTLE ADAM made up "on her hips", departed Miami on a voyage up through the Intercoastal Waterway to Cleary's Landing in North Palm Beach, where she was to pick up the barges MABRO 100 and MABRO 103, loaded with concrete pilings, and tow them back to Miami. LITTLE ADAM had no crew but was towed along the PANTHER's "hip" in the event "the load would be a little too much for one tug". Besides Appellant as Operator, PANTHER was manned by Richard Quinn as First Mate, and Benjamin Crunn as Engineer.

Appellant was making his first trip aboard PANTHER. He had never before operated a tug along the ICW near Hillsboro Inlet, but had transited this particular inlet aboard fishing vessels.

Appellant knew that a flood control system existed in this area of Florida and that flood control gates existed. He studied geology at the University of Miami and in connection with his studies there had discussed the flood gates and the engineering of this flood control system at length. He was aware that the purpose of the flood control system was to prevent flooding and to maintain the water table, and also that it was a means of water control. He was aware that water is let off when there is a surplus, while at other times it is retained. He was aware that when the water was released, it flows out to sea through the canals and waterways.

PANTHER arrived at Cleary's Landing around midnight on the 24th. During the voyage from Miami to Cleary's Landing, the weather had been "messy" due to an abnormally heavy rain.

During 24 and 25 April, southeastern Florida experienced an abnormally heavy rainfall. The areas of highest rainfall intensity for those days occurred on the developed eastern areas of Dade, Broward and southern Palm Beach Counties. Rainfall in excess of ten inches was recorded in a strip from the western portions of Miami to Miami International Airport, north through most of Broward County, to southern Palm Beach County and north to Lake Worth. The highest rainfall quantity for this period, 18.83 inches, was several miles west of Delray Beach. The heaviest rainfall occurred between midnight and 7 a.m. of April 25th. Nevertheless, before 7 a.m., Superintendents for the South Florida Water Management Division at the Homestead, Miami and Ft. Lauderdale Field Stations were aware that a severe event was occurring and were already taking appropriate action. Early action included dispatching field crews to close the gates discharging from conservation areas to the East Coast, and all were closed by 9 a.m. The coastal control structures, though partly open on automatic control, were opened fully, either by dispatching crews to the sites or by means of the newly installed communications and control system.

Included as part of the South Florida Water Management Division are two canals which drain toward and through Hillsboro Canal and Pompano Canal (C-14).

The Hillsboro Canal enters the ICW four miles north of Hillsboro Inlet. This Canal originates in Palm Beach County, but angles down to the Broward side of the county line. It takes, in addition to the drainage from park lands, agricultural areas, and that of Deerfield Beach.

The Pompano Canal (C-14) joins the ICW approximately two and one-half miles to the south of Hillsboro Inlet. This canal originates in the conservation area located at the extreme west end of the County. It regulates a percentage of drainage and conservation areas 2-A and 2-B, then runs east through the areas Tamarac, Coral Springs, North Lauderdale, Margate, Coconut Creek and Pompano. Both these canals are well diagrammed on NOAA Chart 1147 (IO's Exhibit 1).

After arriving at Cleary's Landing, Appellant secured PANTHER to the barges and went to sleep. He arose about 0830 on the 25th, ate breakfast, and had a conversation with the Captain of the tug PRE-STRESS GAL. PRE-STRESS GAL had originally been scheduled to tow the barges to Miami, but had to cancel out because of engine trouble.

The barges were made up in Tandem, with the 100 in the lead. PANTHER was rigged to push both vessels from the stern of the 103.

The flotilla departed Cleary's Landing at approximately 11 a.m., with LITTLE ADAM still on PANTHER's hip.

As the flotilla proceeded southbound in the ICW, it rained "off and on".

PANTHER was equipped with two radios and by use of these Appellant was receiving weather reports every two hours.

At approximately 1700, Appellant pulled the flotilla into a dock at Delray Beach, remaining there until approximately 1800 to take on fresh water.

Delray Beach is located approximately ten miles north of where the Hillsboro Canal enters the ICW.

The southbound transit was resumed. For some distance prior to reaching Hillsboro Inlet the flotilla had been proceeding at a speed of about five knots. Soon after passing the point where Hillsboro Canal enters the ICW, Appellant sensed or should have sensed the effect of the drainage from the canal upon the flotilla.

Though it was Appellant's intention to turn to the right when he had Hillsboro Inlet abeam and continued on through the ICW, when the flotilla was several hundred feet north of the Inlet, he sounded his whistle three times and flashed his searchlight three times to alert the bridge tender to open the bridge crossing the inlet which leads out to the ocean. Appellant wanted the option of proceeding through the inlet and out to the ocean as an alternative to proceeding southbound through the ICW, should he deem it necessary

Entering that portion of the ICW where it is joined by Hillsboro Inlet, Appellant lost control of the flotilla because of PANTHER's inability to overcome the current of the ebb tide augmented by the southbound flow of the drainage from Hillsboro canal and the northbound current from the drainage existing out the Pompano canal.

The flotilla drifted over and lost with fenders, pilings, dolphins and the dock of the Helen S. Marina, as well as various fishing vessels docked there, including SMOKER, GOLDEN C., QUETZAL, FOLLOW THE SUN, and NEW HELEN S, causing various and substantial damages.

After alliding with the structures of the Helen S. Marina and the various vessels docked there, Appellant ordered Benjamin Crum, the Engineer, to start up the tug LITTLE ADAM to render assistance to the flotilla and endeavor to bring the towed barges under

control. Despite these efforts, the flotilla drifted back to the north side of Hillsboro Inlet. Appellant made a futile effort to beach the flotilla on a point of land at the northwest corner of the inlet. The flotilla continued to drift in a southeasterly direction along the northerly shore of Hillsboro Inlet. Eventually the barges were forced through the northernmost part of the bridge over the inlet. Appellant and the other crew members rigged several lines which eventually prevented further movement of the barges toward the ocean. However, the superstructure, of PANTHER became wedge against the bridge's undercarriage, causing PANTHER to develop a 45° list. Soon thereafter, the current swamped her decks and sank her beneath the bridge. The speed of the current in the inlet during these maneuvers was about 12 knots.

BASES OF APPEAL

A. There was not a scintilla of evidence produced by the government which contradicted or refuted the facts and circumstances as testified to by Appellant.

B. The action on the part of the bridge tender in response to Appellant's signal to open the bridge was an intervening if not a contributory factor and this intervening action was sufficient to make null and void the general maritime presumption of fault against a moving vessel that strikes a stationary object.

C. The failure of the Coast Guard to supply Appellant with a copy of the proposed Findings of Fact and Conclusions of Law prejudiced Appellant from filing an appropriate Memo in Opposition.

D. Since 46 U.S.C. 40 provides for the imposition of a fine, it therefore precludes proceeding against Appellant's license under 46 U.S.C. 239.

E. Since 46 U.S.C. 40 fails to set forth in clear and unambiguous terms the time within which a new master is required, if not the owner, to endorse the Certificate of Registry upon taking command of the vessel, Appellant was entitled to a reasonable time in which to comply and he did comply within a reasonable time.

APPEARANCE: Mr. William E. Cassidy, Law Offices of Reginald M. Hayden, A., Fourth Floor, Amerifirst Building, 100 Northeast First Avenue, Miami, Florida 33132.

OPINION

I

There is a presumption of negligence which exists when a moving vessel allides with a stationary object. In this case, M/V PANTHER, which was under the direction and control of Appellant, allide with a fixed shore structure, the Helen S. Marina and several of the vessels moored there. "Upon proof that...[a] moving vessel conned by the...[appellant] allied with a fixed shore structure...an act which is not ordinarily done by a vessel under control and properly managed, a prima facie case of negligence [has been] presented." Decision on Appeal No. 2091. A prima facie case of Appellant's negligence was therefore made out. In effect, there exists a form of res ipsa loquitur whenever a moving vessel strikes a "fixed object which stands mute and defenseless." Ford Motor Co. v. Bradley Transportation Co., 174 F. 2d 192 (6th Cir. 1949).

The proof of the allison created the permission of negligence which Appellant could rebut. Allisions of the sort which occurred in this case "do not ordinarily occur `unless the vessel has been mismanaged in some way' [Patterson Oil Terminals v. The Port Covington, 109 F. Supp. 953 (E.D.Pa. 1952), aff'd. 205 F.2d 694 (3rd Cir. 1953)]; and appellant had the burden of going forward with evidence to meet and rebut this inference of negligence." NTSB Order EM-72. Although Appellant produced some rebuttal evidence, the Administrative Law Judge did not find that the evidence he introduced was sufficient to overcome the presumption of his negligence.

Here, Appellant attempted to rebut the presumption of negligence by contending that the rainstorm of 24 and 25 April 1979 was so severe that it triggered the doctrine of inevitable accident. That doctrine is defined as follows:

An accident is said to be `inevitable' not merely when caused by vis major or the Act of God, but also when all precautions reasonably to be required have been taken, and the accident has occurred notwithstanding. (Gilmore & Black, The Law of Admiralty, 2nd Edition, p. 486.)

None of the evidence adduced by Appellant proved that he had taken all reasonable precautions and that the accident occurred nonetheless.

In his first point of appeal, Appellant contends that the government did not produce even a scintilla of evidence to refute the facts and circumstances as alleged by Appellant. These facts and circumstances testified to by Appellant are in the nature of a rebuttal to the government's prima facie case of negligence and as such need not have been rebutted by the government. From the findings of fact, decision, and order of the Administrative Law Judge, it is apparent that the Administrative Law Judge chose not

to believe that evidence produced by Appellant. In effect then, Appellant asks that I reverse the findings of fact of the Administrative Law Judge. This I decline to do. "The...[Administrative Law Judge] is the trier of facts and his evaluation of weight to be assigned to evidence is ordinarily to be accepted." Decision on Appeal No. 1735. The findings of fact of an Administrative Law Judge will, of course, be overturned where they are "arbitrary" or "capricious", that does not appear to be the case here.

II

Appellant next contends that the actions of the bridge tender in response to Appellant's signal to open the bridge was an intervening, if not a contributing, factor. This contention is totally without merit for the evidence adduced in this case shows that the bridge was opened in time for M/V PANTHER to have proceeded through had Appellant elected to do so. The actions of the bridge tender in no way contributed to the allision in this case nor did his actions do anything to rebut the presumption of Appellant's negligence. Accordingly, Appellant's second ground of appeal is dismissed.

III

Appellant alleges that the failure by the Investigating Officer to furnish Appellant with a copy of the Coast Guard's proposal Findings of Fact and Conclusions of Law denied Appellant an opportunity to file a memo in opposition. This is true. However, it is also true that Appellant was entitled to submit his own proposed Findings of Fact and Conclusions of Law. While it may have been preferable as a matter of courtesy to allow Appellant to submit a memo in opposition to the Investigating Officer's proposals, the fact that Appellant did file his own proposed Findings of Fact leads me to conclude that even though Appellant may have been denied the opportunity to file a memo in opposition no prejudice accrued to Appellant as a result.

IV

As to the charge of misconduct, the finding of guilty must be vacated. 46 U.S.C. 40 places a duty upon the master to ensure that the certificate of registry is properly endorsed. Here, Appellant is not a licensed master but is, rather, a licensed operator. It is inappropriate to find Appellant guilty of an offense which only the master, and not the operator, has a duty to perform. As was noted in Decision on Appeal No. 2153:

An operator may not, for a time in excess of twelve hours

in any twenty four period, `work a vessel...or perform other duties...'If a person serving under the authority of his operator's license could be held, on pain of suspension or revocation of that license, for the non-performance of a `duty' as `master' of a vessel, he might well be suffering for non-performance of an act which the law itself forbids him to perform.

Clearly, it would be inappropriate to find a charge of misconduct while operating under his license proved for the failure of Appellant to perform a duty which is not imposed on a licensed operator but is imposed only upon a "master" of a vessel. It must be noted that this aspect attaches only to suspension and revocation proceedings against a license. The penalty for violation of 46 U.S.C. 40 is available against any master, licensed or unlicensed, but that is a direct matter from an action to suspend a license as operator under R.S. 4450 for failure to perform a statutory duty imposed on a master, precisely as master. Accordingly, the Administrative Law Judge's finding of guilty as to the charge of misconduct will be vacated. In light of this decision, it is unnecessary to reach the points of appeal pertaining to the charge of misconduct.

V

One final point remains to be made. The order of the Administrative Law Judge in this case is directed only against Appellant's license and not his Merchant Mariner's Document. This would appear to be an appropriate action in this case because the offense committed by Appellant in this case is peculiar to a licensed operator. Decision on Appeal No. 1593.

CONCLUSION

The findings of fact of the Administrative Law Judge are based upon substantial and probative evidence available in the record. The decision of the Administrative Law Judge is correct with respect to the charge of negligence.

ORDER

The findings and order of the Administrative Law Judge dated at Jacksonville, Florida, on 17 December 1979, are modified as follows: The findings of the Administrative Law Judge as to the charge of misconduct are SET ASIDE and the charge of misconduct DISMISSED; and the order of the Administrative Law Judge as to the six months suspension on twelve months' probation is MITIGATED to three months suspension on six months' probation. The order of the Administrative Law Judge, as modified, is AFFIRMED.

R. H . SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 29th day of May 1980.

INDEX

Appeals

Findings upheld unless arbitrary and capricious
proposed findings of fact

Charges and Specifications

violation of statute

Evidence

credibility of determined by ALJ

Negligence

allision carries presumption of
intervening causes